IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1487

FORD MOTOR CREDIT COMPANY, *et al.*,
Petitioners,

v.

DENNIS MILHOLLIN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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10 C.J.S. Bills & Notes §251(a), p. 748 29,38

Federal Reserve Board Official Staff Interpretation No. FC-0054, 42 F.R. 18056, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,552 (April 4, 1977) 23,24,25,45

Federal Reserve Board Staff Letter No. 851, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,173 (Oct. 22, 1974) 23,24,43,45

Federal Reserve Board Staff Letter No. 1208, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶31,647 (July 6, 1977) . . . . *passim*

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STATUTORY PROVISIONS AND REGULATIONS INVOLVED

In addition to the citations of Petitioners: Regulation Z, 12 C.F.R. §226.6(c) (1977):

> "At the creditor's or lessor's option, additional information or explanations may be supplied with any disclosure required by this Part, but none shall be stated, utilized, or placed so as to mislead or

confuse the customer or lessee or contradict, obscure, or detract attention from the information required by this Part to be disclosed."

QUESTIONS PRESENTED

The questions presented by Petitioners also concerns:

1. Whether the existence of an acceleration clause in a consumer credit contract which also contains a clause providing for a rebate of finance charges upon prepayment in full prior to the maturity of the obligation has the capacity to violate the provisions of §226.6(c) of Regulation Z.

STATEMENT OF THE CASE

In July of 1974, Dennis and Michelle Milhollin agreed to purchase a used 1973 Ford Pinto station wagon automobile from Dee Thomason Ford (hereinafter the "Dealer"), a Lake Oswego, Oregon automobile dealership. (J.A. 9).[1] Since the Milhollins were unable to pay the full cash price of the automobile, they applied to Ford Motor Credit Corporation (hereinafter the "Finance Company") for financing. (*Mil.* R. 293) When the Finance Company agreed to extend the necessary credit, the Dealer had Mr. and Mrs. Milhollin

[1]On the date of purchase Dennis Milhollin was 19 years old and Michelle Milhollin was 20 years old. Each was employed. Throughout the course of this litigation the Respondents have been referred to as "Milhollin". However, Respondents surname is actually spelled "Millhollin". (J.A. 9)

sign the Finance Company's standard "Oregon Automobile Retail Installment Contract (FMCC July 74 11236)." (J.A. 9, 10) The front of this form, in addition to containing contractural provisions, also served as a disclosure statement for the purposes of the Truth in Lending Act and Regulation Z. The back of the form contained additional contractural provisions. The Finance Company supplied this form contract to the Dealer for use in the Dealer's credit transactions.[2]

The cash price of the station wagon was $3,098.00, while the deferred payment price was $3,984.64; a sum which reflected a finance charge, the premium for credit life insurance on Dennis Milhollin's life, and lien recording fees. (J.A. 9)

Mr. and Mrs. Milhollin made a downpayment of

[2]At the time of sale and extension of credit, the Milhollins and Miss Donna Eaton, the other respondent, (hereinafter "Consumers") dealt only with their respective automobile dealers. (Miss Eaton dealt with Bud Meadows Mazda, a Portland automobile dealership). (J.A. 61,65) Each dealer offered the extension of credit, presented Consumers with credit applications and pre-printed form installment contracts, and made all of the explanations of the transactions. (*Mil* R. 198-200, 291-2; J.A. 67) However, the Finance Company periodically supplied the Dealers with the credit applications and the retail installment contracts which the Dealers used in their transactions. (*Mil* R. 99, 101; *Eaton* R. 74, 75)

The Dealers assigned the contracts to the Finance Company pursuant to the terms in a Master Agreement, (J.A. 16; *Eaton* R. Conn dep. 8) and neither Dealer financed their own contracts. (*Mil* R. 82, 99; *Eaton* R. Conn dep. 6). At the time the transactions were consummated it was the intention of each Dealer to assign the contract to the Finance Company, and the Finance Company accepted for financing the substantial majority of the contracts tendered. (*Mil* R. 82, 99, 292; *Eaton* R. Conn dep. 7, 20)

\$900.00,[3] and agreed to pay the outstanding total of payments of \$3,084.64 by making 36 monthly installment payments of \$85.86, with the payments due on the 29th day of each month. (J.A. 9)[4]

If the Milhollins were more than ten days late with any payment, Finance Company's form contract imposed a delinquency charge of the lesser of 5% of the late payment of \$5.00.

> (12) Delinquency Charges: Buyer hereby agrees to pay a delinquency charge on each installment in default for more than 10 days in the amount of 5% thereof or \$5.00, whichever is less, plus such expenses incurred by Seller in affecting collection hereunder as may be allowed by law.

This delinquency charge was the only disclosure on the face of the contract which contained any information concerning the consequences of a late payment. (J.A. 9)

The compacted print on the reverse of the contract contained a clause whereby the Finance Company reserved the right to declare "all amounts due or to become due" under the contract "to be immediately due and payable" without notice or qualification, and without regard to the ten day grace period disclosed on

[3] A cash downpayment of \$400.00, a \$300.00 credit for the trade-in of their old automobile, and a \$200.00 pickup payment paid on August 12, 1974. (J.A. 9, 16)

[4] Under the contract the Milhollins, at any time prior to maturity, could prepay the outstanding total of payments in full. Upon such prepayment, Finance Company would rebate the unearned portion of the finance charge under the "sum of the digits" formula after first taking an acquisition fee of \$15.00.

the face of the contract.[5] This right of acceleration became enforceable in the event the Milhollins committed any of a number of acts, including defaulting on any payment.

This contractual right to accelerate the maturity of the obligation did not provide for a rebate to the consumer of any unearned finance charges, whether determined as of the accelerated maturity date or upon the date of some subsequent actual payment.

Shortly after the purchase of the automobile both Dennis and Michelle Milhollin became unemployed and were forced to seek financial assistance from the local public welfare department. (*Mil* R. 31)[6] The Milhollins missed the installments which were due on December 29, 1974 and January 20, 1975,[7] and on February 21,

[5] The clause appears in paragraph 19, which provides in part:

> Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or a proceeding in bankruptcy, receivership or insolvency shall be instituted by or against Buyer or his property, or Seller deems the Property in danger of misuse or confiscation, or Seller otherwise reasonably deems the indebtedness or the Property insecure, *Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable* and Seller shall have all the rights and remedies of a Secured Party under the Uniform Commercial Code, including the right to repossess the Property wherever the same may be found.... (emphasis supplied) (J.A. 10)

[6] Mr. and Mrs. Milhollin have proceeded *in forma pauperis* throughout the course of this litigation. They were initially represented by attorneys from Multnomah County Legal Aid, a publically funded office of the National Legal Services Corporation.

[7] The Milhollins made the following payments under the contract: August 12, 1974–\$200; August 26, 1979–\$85.68; November 19, 1974–\$85.68; December 2, 1974–\$85.68; December 16, 1974–\$85.68. (J.A. 19)

1975, the Finance Company, without advance notice, repossessed the automobile. (J.A. 9, 17, 19; *Mil* R. 95) On the same day as the repossession Dennis and Michelle Milhollin contacted the Finance Company in an attempt to recover their automobile. The Finance Company advised them that it considered the Milhollins delinquent in the amount of $171.36, consisting of two delinquent installments of $85.68 each. Mr. and Mrs. Milhollin offered immediately to pay the Finance Company the entire delinquent amount of $171.36 but the Finance Company refused to return the automobile unless the Milhollins paid $2,440.42. (J.A. 17, 18, 20) Mr. and Mrs. Milhollin were unable to pay the accelerated $2,440.42, and consequently lost not only the possession of the station wagon but also the benefit of the $1,242.72 which they had already paid to the Finance Company.[8]

Mr. and Mrs. Milhollin subsequently filed an action against the Dealer and the Finance Company for statutory damages under the Truth in Lending Act, alleging that the Defendants failed to clearly disclose certain essential credit terms prior to the execution of the contract.[9]

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[8]This sum consisted of a $900.00 downpayment plus four installments of $85.68.

[9]Donna Eaton suffered virtually identical treatment from the Finance Company. After purchasing an automobile she became ill and was forced to terminante her employment and seek public assistance. (*Eaton* Eaton dep. 14, R. 70). She missed some of her installment payments whereupon the Finance Company accelerated the balance of her contract and took possession of the automobile. (*Eaton* R. 70) Ms. Eaton lost the posession of her automobile as well as the benefit of the $1,438.84 which she had previously paid to the Finance Company. (J.A. 65, *Eaton* R. 64)

SUMMARY OF ARGUMENT

1. The Truth in Lending Act (herein "the Act") was enacted in 1968 by Congress for the express purpose of promoting the informed use of consumer credit by the American consumer. Congress determined that the informed use of credit results from an awareness of the cost thereof, and therefore the Act requires creditors to disclose essential credit terms in a clear, conspicuous and meaningful manner. 15 USC §1601; *see Mourning v. Family Publications Services, Inc.*, 411 US 356 (1973).

Pursuant to authority granted in the Act, the Federal Reserve Board promulgated Regulation Z, 12 CFR §226.1 *et seq*, which contains the enforcing regulations implementing the Act. Among the significant disclosure requirements of Regulation Z are §226.8(a) which requires all disclosures to be made before the transaction is consummated, and §226.8(a)(1) which requires all of the disclosures to be made together on the same side of the same page and above the place for the customers signature.

These consolidated cases present important issues in connection with consumer credit contracts and the disclosure requirements of the Truth in Lending Act and Regulation Z. These issues all pertain to contractural acceleration clauses and whether these clauses and their effect on unearned finance charges is information which must be disclosed to consumers pursuant to the provisions of Regulation Z.

The initial question pertains to whether Regulation Z encompasses these clauses, and if so, then under what circumstances and to what extent must they be dis-

closed on the face of a contract? Second, does the contract of the Petitioner violate the disclosure provisions of the Act and Regulation Z for failing to meaningfully disclose an acceleration clause and its effect on the finance charge?

2. Installment contracts typically grant the customer the right to terminate the contract prior to its maturity by prepaying the obligation. In this situation the customer will often be entitled to a rebate of unearned finance charges under the contract since the customer has not had the use of the creditor's money (credit) for as long as the parties had anticipated at the inception of the transaction.

Installment contracts also typically contain an acceleration clause, which is a provision which allows the creditor to accelerate the maturity of the contract and demand immediate payment of the obligation from the consumer. Like the process of voluntary prepayment, acceleration of the contract balance also causes an early termination of the contract, thereby raising the possibility of a rebate of unearned finance charges.

Acceleration clauses are usually located on the reverse of the contract or on a separate document from that which contains the required disclosures. These same contracts commonly disclose on their face that in the event of prepayment in full of the obligation the consumer will be entitled to at least a partial rebate of unearned finance charges. This disclosure will also usually contain a description of the method by which the finance charge rebate will be calculated (e.g., "sum of the digits" or "Rule of 78's").

3. The Federal Reserve Board has promulgated §226.8(b)(7) of Regulation Z, which requires the

disclosure of the method to be used in computing any unearned portion of the finance charges in the event of prepayment in full of the obligation. If the contract does not provide for a rebate upon prepayment in full, this Regulation requires that fact to be disclosed. As with all consumer protection statutes, the terms of the Act should be liberally construed in favor of the consumer as the class of person it was intended to protect.

4. The Ninth Circuit and the opinion letters issued by the members of the Federal Reserve Board Staff correctly assert that the process of acceleration is equated to prepayment of the contract obligation, thereby bringing acceleration under the disclosure requirements of §226.8(b)(7). Early termination of the contract by either prepayment or acceleration affects the amount of the finance charge which has been earned by the creditor, and this potential cost to the customer is information which should be clearly and meaningfully disclosed under the Act and Regulation Z.

5. If a creditor rebates under one method for acceleration and another for voluntary prepayment, both methods need to be identified under §226.8(b)(7). *See* Staff Opinion Letter No. 851. This assures disclosure to the consumer of meaningful information concerning the various costs of credit, as intended by the Truth in Lending Act. 15 USC §1601.

The acceleration clause disclosed on the back of the contract used by the Finance Company unequivocably entitles the Finance Company to collect the entire unpaid balance of the contract, including all unearned finance charges. Since the Finance Company did not meaningfully disclose on the face of its contract either

the acceleration clause or anything approximating its effect or unearned finance charges, the disclosure provisions of §226.8(b)(7) of Regulation Z have been violated. *See* Staff Letter No. 851; Official Interpretation No. FC-0054.

6. Under the regulations the creditor is prohibited from including in a contract additional information which has the capacity to mislead or which contradicts or obscures a required disclosure. *See* §226.6(c) of Regulation Z. Specifically, a creditor may not disclose a rebate method on the front of the contract if the acceleration clause on the back of the contract implies or states that there will be no rebate upon acceleration. *See* Staff Opinion Letter No. 1324.

The Finance Company asserts that its undisclosed and nonbinding rebate policy for acceleration is identical with that disclosed on the face of the contract for prepayment. However, the acceleration clause in the contract not only directly contradicts this assertion, but would lead a customer into reasonably believing that upon acceleration there would be no rebate of finance charges. The Finance Company has therefore violated the requirements of §226.6(c) of Regulation Z.

7. The purpose of the Truth in Lending Act is to provide meaningful disclosures of credit terms to consumers in order to foster the informed use of credit. The Finance Company argues that its disclosure of a rebate method for voluntary prepayment adequately communicates to the consumer that these same rebate methods will be used for acceleration as well.

In fact it is unreasonable to assume that any consumer will understand the term prepayment to somehow include acceleration. Moreover, the prepay-

ment disclosure used by the Finance Company is limited to voluntary prepayment prior to maturity of the obligation; acceleration on the other hand is an involuntary imposition on the consumer which matures the entire debt. There is no meaningful disclosure of acceleration.

8. The ruling of the Ninth Circuit was in accord with the important premises of the Federal Reserve Board staff letters on the issue of disclosure of the effect of acceleration. However, the Ninth Circuit has fashioned a disclosure rule which avoids the inconsistencies of the staff letters and insures a meaningful disclosure of the effect of acceleration.

The staff letters of the Federal Reserve Board require a separate disclosure of rebate methods only if the rebate method disclosed for prepayment is different from that used upon payment after acceleration. In all other cases the face of the contract is silent as to acceleration or its effect on the finance charge.

A consumer who reads the underlying contract to determine whether there will be a finance charge rebate upon acceleration may find either an acceleration clause identical to that used by the Finance Company herein and which clearly grants the creditor the right to retain all unearned finance charges, or an acceleration clause which is ambiguous as to the right to receive a rebate. In these instances the acceleration clause either contradicts the prepayment disclosure or misleads the consumer, in violation of §226.6(c) of Regulation Z. *See* Staff Opinion letter No. 1324.

A consumer may also find an acceleration clause which provides for a rebate of finance charges but does not disclose the method of computing the rebate. In

this instance the staff of the Federal Reserve Board suggests that undisclosed creditor rebate policy or state consumer credit statutes would explain the method. *See* Staff Opinion letters No. 1208, 1324. In either of these instances, however, it is unrealistic to assume that the consumer will be able to ascertain the undisclosed policy, or be familiar with the differing, and often intricate, state statutes. Both alternatives suggested by the staff are contrary to the purpose of the Act of providing meaningful disclosure, and are problems avoided by the rule of the Ninth Circuit.

9. Congress intended that the primary enforcement mechanism of the Act would be litigation by the consumer. Congress encouraged this enforcement by providing for guaranteed minimum damages for the successful consumer litigant, but with a one year limitation period commencing at the date of the transaction. However, by not uniformly requiring separate rebate disclosures for prepayment and acceleration the Federal Reserve Board staff assumes that until the actions of the creditor regarding rebate reflects otherwise, the prepayment disclosure also reflects creditor's rebate method for acceleration.

Once the one year limitation has expired, a creditor might simply alter its prior undisclosed and non-binding rebate policy, and not rebate upon acceleration. Though such a change would render the original disclosure meaningless, the consumer would not be able to utilize the enforcement mechanism of the Act.

10. While the Federal Reserve Board staff has adopted an approach to the issue of rebates upon acceleration which is in accord with the principles of Truth in Lending, certain of the statements in the staff

opinions are not entitled to great deference by the Courts since they are not regulations issued by the Board itself, and they do not reflect the necessary thoroughness of consideration. Application of these certain positions would create obstacles to insuring that the consumer receives meaningful credit information, and therefore would not be reasonably related to the purposes of the Truth in Lending.

CONCLUSION

The rule of the Ninth Circuit and the basic approach of the Federal Reserve Board staff are in accord with the principle that the effect on the finance charge is important information to be disclosed to the consumer under the provisions of the Truth in Lending Act. However, application of certain of the statements of the Board fail to guarantee the consumer consistently meaningful disclosure of the important information. The approach of the Ninth Circuit avoids these problems while fostering the goals of the Truth in Lending Act, and the judgement below should be affirmed based on the analysis in *St. Germaine v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977).

ARGUMENT

I.

CONGRESS ENACTED THE TRUTH IN LENDING ACT TO PROTECT CONSUMERS THROUGH THE MEANINGFUL DISCLOSURE OF THE ESSENTIAL COSTS AND TERMS OF CONSUMER CREDIT CONTRACTS.

The Truth in Lending Act was passed by Congress in 1968 as part of an effort to relieve consumers from certain divergent, and often fraudulent, creditor practices in connection with the disclosure of credit terms. 15 USC §1601; *Mourning v. Family Publications Service, Inc.*, 411 US 356, 364 (1973). Writing in *Mourning*, Chief Justice Burger reviewed the legislative underpinning of the Truth in Lending Act as follows:

> Passage of the Truth in Lending Act in 1968 culiminated several years of Congressional study and debate as to the propriety and usefulness of imposing mandatory disclosure requirements on those who extend credit to consumers in the American market. By the time of passage, it had become abundantly clear that the use of consumer credit was expanding at an extremely rapid rate. From the end of World War II through 1967, the amount of such credit outstanding had increased from \$5.6 billion to \$95.9 billion, a rate of growth more than 4½ times as great as that of the economy. Yet, as the congressional hearings revealed, consumers remained remarkably ignorant of the nature of their credit obligations and of the costs of deferring payment. *Because of the divergent, and at times fraudulent, practices by which consumers were informed of the terms of the credit extended to them, many consumers were prevented from shopping for the best terms available and, at times, were prompted to assume liabilities they could not meet.* Joseph Barr, the Under Secretary of the Treasury, noted in testifying before a Senate subcommittee that such blind economic activity is inconsistent with the efficient functioning of a free economic system such as ours, whose ability to provide desired material at the lowest cost is dependent on the asserted preferences and informed choices of consumers. *Mourning v. Family Publications*, 411 US at 363-364 (emphasis supplied).

Congress determined that the most effective method of preventing consumer abuse, while promoting a new credit awareness on the part of the consumer, was through the requirement of meaningful disclosure of essential credit terms.[10] Consequently, the thrust of the Truth in Lending Act is disclosure, the "erecting [of] a barrier between the seller and the prospective purchaser in the form of hard facts" which would equip the consumer with the information necessary to make an

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[10]This Congressional determination is incorporated into the statement of the purpose of the Act, at 15 USC §1601:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

informed credit purchase. *Mourning v. Family Publications*, 411 US at 377.

The fundamental guarantees of the Act's effectiveness are the twin requirements of prospective disclosure and clarity of disclosure. *See Ratner v. Chemical Bank New York Trust Company*, 329 F. Supp. 270, 276 (S.D.N.Y. 1971). The Act requires that all disclosures of credit terms be made prior to the point at which a consumer enters into a binding contract, for it is only through prospective disclosure that the consumer will be able to compare the various credit terms available and thereby avoid the uniformed use of credit.[11]

The second requirement of clarity of disclosure is more aptly entitled "meaningfulness of disclosure." "The Truth in Lending Act reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose'." *Mourning v. Family Publications*, 411 US at 377. However, a disclosure reflects this transition only if it provides meaningful credit information to the prospective consumer; information which is pertinent, clear and allows the consumer the opportunity to make an

[11]When Congress passed Truth in Lending Act it authorized the Federal Reserve Board to promulgate regulations to enforce the purpose of the Act. 15 USC §1604. These regulations are embodied in Regulation Z at 12 CFR §226.1, *et seq.* §226.8(a) of Regulation Z provides that all disclosures shall be made before the transaction is consumated.

informed credit choice.[12]

The Act attempts to guarantee meaningful disclosure by minimizing the amount of unclear terminology and ambiguities traditionally contained in consumer credit contracts, thereby reducing the opportunity for the creditor to assert the standard of " 'words mean what I say they mean', [which] is touted in Alice in Wonderland." *Woods v. Beneficial Finance Co. of Eugene*, 395 F. Supp. 9, 14 (D. Or. 1975). *See also Mourning v. Family Publications*, 411 US at 363. Regulation Z accomplishes this goal by providing that certain credit provisions *must* be disclosed through the use of mandatory terminology,[13] and requiring the creditor to dis-

[12]Chief Justice Burger noted in *Mourning* that: "Some may cliam that it is a relatively easy matter to calculate the total payments to which petitioner was committed by her contract with respondent; but at the time of sale, such computations are often not encouraged by the solicitor or performed by the purchaser." *Mourning v. Family Publications*, 411 US at 377.

This reasoning is applicable to any of the disclosures required by the terms of the Truth in Lending Act or Regulation Z. The disclosure should be understandable at the time of the transaction by average credit ignorant consumer.

> The purpose of that statute is to permit the ordinary consumer, without regard to his degree of commercial sophistication, to receive the kind of credit information that will allow him effectively to compare the credit terms being offered in the marketplace and thus to 'shop' for the most favorable terms available (15 U.S.C. §1601).
> *In the Matter of Beauty-Style Modernizers*, 83 F.T.C. 1761, 1779 (1974).

See Grey v. European Health Spas, Inc., 428 F. Supp. 841, 846 (D. Conn. 1977); *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp at 276; *In the Matter of Zale Corp.*, 78 F.T.C. 1195 (1971), aff'd, 473 F2d 1317 (5th Cir. 1978).

[13]E.g. §226.8(c)(8)(i) requires use of the term "finance charge".

close other credit information clearly and conspicuously.[14]

A. The Existence of An Acceleration Clause and Its Effect on Unearned Interest Is Information Which Should Be Meaningfully Disclosed To The Consumer.

The circumstances under which an obligation may be terminated prior to maturity, and the effect which such a premature termination has on the finance charge, is the type of information which must be clearly and conspicuously disclosed to the consumer if the consumer is to receive meaningful information regarding essential credit terms, and thereby make an informed credit clause. 15 U.S.C. §1601.

Consumer installment contracts typically permit the buyer to prepay the obligation prior to maturity. Since the amount of the finance charge is computed at the inception of the obligation as if the contract will run it's full term, upon early termination the consumer will generally be entitled to a partial rebate. Since this finance charge adjustment will affect the ultimate cost of the credit, it is necessary for the consumer to understand prior to entering into the obligation exactly how and under what circumstances the finance charge will be adjusted if the contract is prepaid.

This same reasoning is applicable to acceleration clauses. These clauses are contained in the majority of

[14]E.g. §226.8(b(5) requires the meaningful disclosure of "a description or identification of the type of any security interest held or to be retained". The exact terminology to be used in the disclosure is left to the creditor.

consumer installment contracts. Note, 53 Ind. L.J. 97 (1977-78). They grant a creditor the right to demand immediate payment of the entire unpaid balance of an obligation upon the occurrence of some event, typically a late payment or other act of default by the consumer. II Gilmore, Security Interests in Personal Property, §43.4 (1965). Such an acceleration also involves an early termination of the contract and, like prepayment, often involves an adjustment of the finance charge.[15] However, unlike the situation involving early payment of the contract, an unexpected acceleration can also have a devastating financial effect on the consumer.[16] Consequently, as recognized by the United States in their Amicus Brief:

> [T]he [Federal Reserve] Board staff recognized that the process of acceleration may subject the borrower to additional costs that must be disclosed

[15]This is in accord with the position of the Solicitor General:

> Because the finance charge is included in the amount of the debt at the inception of the contract, exercise of either the creditor's right to accelerate or the debtor's right to prepay in full requires a determination of the amount owing at the time the right is exercised. To determine the amount owed, it is necessary to compute how much of the finance charge added to the original debt (precomputed finance charge) has been earned and how much will be credited (rebated) to the consumer. This computation must be made whether the borrower discharges the obligation or whether the creditor seizes the collateral and sells it to satisfy the the outstanding balance.
> Amicus Brief of United States, 10.

[16]Mr. and Mrs. Milhollin lost their automobile to the Finance Company even though they tendered the delinquent payments because they were unable to immediately pay the accelerated balance of their contract.

if the consumer is to be "given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967). Amicus Brief of United States, 12.

The Federal Reserve Board and the government each recognize that it is important that the consumer be given information concerning the potential adjustment of the finance charge upon acceleration. The only disclosure on the face of the Finance Company's contract which addresses this potential adjustment, reads:

> Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final installment hereunder and if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00. (J.A. 9, 65)

The question before the Court is whether this disclosure is sufficient under the regulations issued by the Federal Reserve Board and the purposes of the Truth in Lending Act to give the consumer meaningful information regarding acceleration and its effect on the finance charge.

B. The Truth in Lending Act Should Be Liberally Construed In Favor of the Consumer.

The Court should consider this question in light of a principle of interpretation which is applied to the

provisions of the Truth in Lending Act, and which is often applied to remedial legislation: the statute should be construed to achieve the protection of the class whom the drafters sought to assist. In *N. C. Freed Co., Inc. v. Board of Governors of the Federal Reserve System*, 473 F.2d 1210 (2nd Cir. 1973), the court explained:

> The Act is remedial in nature, designed to remedy what Congressional hearings revealed to be unscrupulous and predatory creditor practices throughout the nation. Since the statute is remedial in nature, its terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated. 437 F.2d at 1214.

Subsequent cases have applied this principle to numerous aspects of the Truth in Lending Act. *See Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 878 (7th Cir. 1976); *Zeltzer v. Carte Blanche Corporation*, 514 F.2d 1156, 1164, fn. 21 (3rd Cir. 1975); *Sellers v. Wollman*, 510 F.2d 119, 122 (5th Cir. 1975); *Eby v. Reb Realty, Inc.*, 495 F.2d 646, 650 (9th Cir. 1974); *Littlefield v. Walt Flanagan & Co.*, 498 F.2d 1133, 1136 (10th Cir. 1974); *Thomas v. Meyers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973); *Gardner and North Roofing and Siding Co. v. Board of Governors of the Federal Reserve System*, 464 F.2d 838, 841 (D.C. Cir. 1972).

II.

THE PUBLIC PRONOUNCEMENTS OF THE FEDERAL RESERVE BOARD STAFF AND THE POSITION OF THE GOVERNMENT ARE CONSISTENT WITH THE RULING OF THE COURT BELOW THAT THE FINANCE COMPANY'S CONTRACT VIOLATED THE DISCLOSURE PROVISIONS OF §226.8(b)(7) OF REGULATION Z.

A. As Evidenced By The Pronouncements of The Federal Reserve Board Staff and The Position of the Solicitor General, the Finance Company Has Violated the Provisions of §226.8(b)(7) of Regulation Z.[17]

The Federal Reserve Board staff has consistently equated an acceleration of payments with a prepayment of the contract obligation, thereby bringing acceleration

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[17]§226.8(b)(7) of Regulation Z provides:

(b) Disclosures in sale and nonsale credit. In any transaction subject to this section, the following items, as applicable, shall be disclosed:

. . .

(7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount of method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed.

within the disclosure requirements of §226.8(b)(7):[18]

> For the purposes of Truth in Lending disclosures this staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of §226.8(b)(7) of the Regulation, which require the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made, apply. If the creditor rebates under one method for acceleration and another for voluntary prepayment, both methods would need to be identified under §226.8(b)(7). Failure to disclose the method of rebate or nonrebate would be a violation of the Truth in Lending Act. Public Information Letter No. 851, [1974-1977, Transfer Binder] Cons. Cred. Guide (CCH) paragraph 31, 173 (October 22, 1974).

The face of the Finance Company's contract discloses that the buyer may prepay the obligation and thereby receive a rebate of the unearned portion of the finance charge computed under the sum of the digits method. The Finance Company did not disclose on the front of the contract either the existence of an acceleration clause or its effect on unearned interest.

The only reference on the face of the contract to default and the consequences thereof specified that any payment more than ten days late would result in an

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[18]*See* Official Staff Interpretation No. FC-0054, (1974-1977 Transfer Binder), Cons. Cred. Guide (CCH), paragraph 31, 552 (April 4, 1977), which states: "Staff understands that letter to say that early *payment* of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation." (emphasis in original)

additional fee of the lesser of $5.00 or 5% of the delinquent installment payment. (J.A. 9, 65).

However, the reverse of the contract specifies that under certain circumstances, including a default by the customer, the Finance Company may accelerate the entire unpaid balance of the contract.

> [S]eller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable . . . (J.A. 10, 66).

Without equivocation or ambiguity, this provision entitles the Finance Company to collect the entire unpaid balance of the contract, including principal, earned finance charges, and unearned finance charges.[19] In regard to the rebate of finance charges, the contract is not silent; there is no allowance for a finance charge rebate, either at the time of the acceleration or in the event of some type of subsequent payment by the consumer. There is no statement that the credit contract does not provide for any rebate of unearned finance charges.

Since this method of rebate, or more accurately the lack thereof, in the event of acceleration is significantly different from anything disclosed on the face of the contract, the Finance Company has violated the provisions of §226.8(b)(7). *See* Federal Reserve Board Official Staff Interpretation No. FC-0054; Federal Reserve Board Staff Opinion Letter No. 851.

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[19]On one other occasion the Finance Company has not deemed itself bound by its undisclosed policy. In *Block v. Ford Motor Credit Company*, 286 A2d 228 (D.C. App. 1972), the Finance Company asserted that an acceleration clause virtually identical to the clause involved herein entitled the Finance Company to all unearned finance charges.

B. As Evidenced By the Pronouncements of the Federal Reserve Board Staff, the Finance Company has Violated the Provisions of §226.6(c) of Regulation Z.

The Finance Company has violated the provisions of § 226.6(c) of Regulation Z which provides:

> At the creditor's or lessor's option, additional information or explanations may be supplied with any disclosure required by this Part, but none shall be stated, utilized, or placed so as to mislead or confuse the customer or lessor or contradict, obscure, or detract attention from the information required by the Part to be disclosed.

In connection with acceleration clauses, the Federal Reserve Board Staff has interpreted this regulation as follows:

> [A] statement in the underlying contract which apparently gives the creditor the right to retain such unearned finance charges may mislead a customer into believing that there will be no rebate upon acceleration. Such a contractual provision, if supplied to a customer with rebate method disclosure required by § 226.8(b)(7) (e.g., as part of a combined note and disclosure form or where separate note and disclosure forms are presented to the customer simultaneously), would constitute additional information within the meaning of §226.6(c) of Regulation Z. If this additional information is misleading or confusing, or contradicts, obscures, or detracts attention from the required §226.8(b)(7) disclosure, there would be a violation of the regulation. Federal Reserve Board Staff Opinion Letter No. 1324, 5 Cons. Cred. Guide (CCH), paragraph 31, 827 (November 14, 1978).

The face of the Finance Company's contract states that upon prepayment the buyer will receive a rebate of the finance charge. The reverse of the document, which is part of the underlying contract, directly contradicts this statement by providing that upon early termination by acceleration the entire unpaid balance of the obligation is immediately due and payable. The contract provides that upon acceleration the consumer immediately becomes obligated to pay all amounts originally scheduled to become due, without benefit of any rebate of unearned finance charges.

The Finance Company has placed a disclosure on the back of the contract which directly contradicts a disclosure on the face of the contract and therefore has violated §226.6(c) of Regulation Z.

III.

THE FINANCE COMPANY'S ANALYSIS OF THE DISCLOSURE REQUIREMENTS OF REGULATION Z DEFEANTS THE PURPOSE OF THE TRUTH IN LENDING ACT.

A. The Finance Company Equates Meaningful Disclosure with Hidden, Unstated, Non-Binding Corporate Policy.

The Finance Company has responded to the allegations that it violated the provisions of §226.8(b)(7) and §226.6(c) of Regulation Z by arguing that its corporate policy, albeit a policy not disclosed in the contract, is to rebate finance charges upon acceleration in exactly the same manner as the method used for prepayment,

disclosed on the face of the contract. The apparent reasoning supporting this argument is that it would be redundant to have a separate disclosure of the rebate policy upon acceleration, since this policy is identical with that used for prepayment. In the context of the Finance Company's contract this argument must fail for a number of reasons.

1. Reliance on Undisclosed Corporate Policy is the Antithesis of Meaningful Disclosure.

The Finance Company's position is the antithesis of the purpose of the Truth in Lending Act. The Act reflects a transition in policy from one of *caveat emptor* to one of forcing the seller to disclose credit terms in the form of hard facts. *See Mourning v. Family Publications*, 411 US at 377. Under the provisions of the Truth in Lending Act, these hard facts are to be disclosed on the face of the contract or together in a separate disclosure statement. §226.8(a) of Regulation Z.

The Finance Company's assertion of corporate policy is directly contrary to these principles. The contract states unequivocably that upon acceleration the Finance Company has the right to declare all sums due or to become due under the contract to be immediately due and payable. There is no apparent room in this clause for rebate of any unearned finance charges, and a consumer who read this provision would reasonably understand that an obligor on the contract had no right to a rebate of finance charges upon acceleration.

2. Despite Alleged Undisclosed Corporate Policy, Oregon Law Allows the Finance Company to Retain Unearned Finance Charges Upon Acceleration.

Nothing in Oregon law appears to contradict the Finance Company's claim to all unearned Finance Charges upon acceleration. Respondents agree with the Government that it is unreasonable to attribute to the consumer a knowledge of state law.[20]

Even with a knowledge of state law, an Oregon consumer's understanding of the Finance Company's contract would be confirmed. ORS 83.620(1), which is part of the Oregon Motor Vehicle Sales Act, provides:

> Notwithstanding the provisions of a retail installment contract to the contrary, the buyer may pay in full at any time before maturity the obligation contained in the retail installment contract. Upon such premature prepayment, the buyer shall receive a refund credit. ORS 83.620(1) (Or. L. 1977).

ORS 83.660, a different section of the same Act, provides:

> *Acceleration Provision.* No provision in a retail installment contract by which, in the absence of the buyer's default, the holder may, arbitrarily and

[20]The Solicitor General in his brief at 28 properly criticized *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975), and *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1978). Those cases hold that provisions of state statutes modify by operation of law the stated language of the Truth In Lending disclosures. Under those decisions, the borrower must become an expert in his or her state's consumer credit statutes to know what the contract really means. Nothing could be further from the intent of the Act.

> without reasonable cause, *accelerate the maturity* of any part or all of the time balance is enforceable. This section does not prohibit provisions in a retail installment contract accelerating any part or all of the time balance in the event of sale of transfer, or removal outside the state of the motor vehicle covered by the contract. (emphasis supplied) ORS 83.660 (Or. L. 1977).

When these two statutes are read in conjunction, it is clear that ORS 83.620(1) applies only to actual payment of the indebtedness before the scheduled date of maturity of the obligation. However, ORS 83.660 applies to an accelerated maturity caused by default, and does not provide for a finance charge rebate.[21]

[21]The Finance Company's statement in a footnote of its Petition for a Writ of Certiorari, page 13, that the word "maturity" as used in the section of the Oregon statute concerning prepayments (ORS 83.620) and the disclosure statement refers only to the originally scheduled date of maturity and not on accelerated maturity, is belied by ORS 83.660. Petitioners argument relies solely on an unexplained statement made by the Eighth Circuit which was not essential to its holding, which concerned Minnesota law and not Oregon law, and which appears to be erroneous upon a reading of the two Minnesota cases it cites in a footnote. *Griffith v. Superior Ford*, 577 F.2d 455, 460 (n.7) (8th Cir. 1978). The two Minnesota cases cited but not discussed by the Court both refer to an "acceleration of maturity."

Whatever the particulars of one state's laws, the general rule is that acceleration is an acceleration of maturity. In addition, *see*, e.g., Uniform Consumer Credit Code (1974 Act) §2.510, and state cases which speak of the "acceleration of the maturity" of a consumer credit obligation. *See*, e.g., Uniform Consumer Credit Code (1974 Act) §2.210(8) and 10 C.J.S. Bills & Notes §251(a) at 748, which states that:

> A note providing for the payment of the principal in installments at specified times, and requiring the payment of interest on each installment until maturity, does not require the payment of future unearned interest in the event *the maturity date is hastened by virtue of an acceleration clause* contained in the note. (emphasis added)

3. Reliance on Undisclosed, Non-Binding Corporate Policy Allows the Type of Consumer Abuse Intended to Be Prevented by the Truth in Lending Act.

The Finance Company would have the consumer disregard its written acceleration clause and somehow discern that upon acceleration the Finance Company would actually rebate a portion of the unearned finance charge by use of the sum of the digits method.[22] Adopting the reasoning of the Finance Company would entail the necessity for the consumer to discern and digest these different finance charge rebate policies: a policy disclosed on the face of the contract which by its terms is applicable only to actual prepayment; a written but apparently fictituous policy of non-rebate contained on the reverse of the contract and applicable in the event of acceleration; and an actual rebate policy for acceleration which is not disclosed anywhere in the contract unless the consumer assumes it is covered by the disclosed policy for prepayment.

This rebate policy confusion continued in the transaction entered into by Donna Eaton. Between the date

[22]At the time Mr. and Mrs. Milhollin entered into their contract, the Finance Company's apparent corporate policy was to rebate finance charges upon acceleration by use of the method disclosed on the front of the contract. This policy is evidenced by the affidavit of L. B. Plumber, the Finance Company's Portland, Oregon branch manager, submitted November 19, 1975 as part of the litigation in *Milhollin*.

> In the event Ford Motor Company decides to accelerate the balance owed as a result of the default of the contract purchaser, it always computed the interest rebate the same as it would compute it if the contract purchaser voluntarily prepaid the contract as set forth in Paragraph 14 of the face of the contract. (J.A. 22)

of the Milhollin's transaction in 1974 and the Eaton transaction in 1975 the Finance Company apparently altered its corporate rebate policy. Though the change was not relected anywhere in its contracts when Donna Eaton signed her contract on June 28, 1975, the actual policy of the Finance Company was to rebate finance charges upon acceleration only at the time of the payment of the accelerated balance.[23] As with the Company's prior policy, this policy is contrary to the written disclosure in the contract.

This form of meaningless disclosure is exactly the type of calculated ambiguity which the Truth in Lending Act was intended to remedy. An interpretation of the Truth in Lending Act which allows the creditor to disclose one policy while actually implementing another, would create the potential for the type of fraudulent creditor practices condemned by Chief Justice Burger in *Mourning v. Family Publications Service, Inc.*, 411 US 356, 363 (1972).

A creditor could orally inform a potential customer that upon acceleration the customer would receive a finance charge rebate or, as the Finance Company argues, assume that the customer will interpret the prepayment rebate policy on the face of the contract as also applying to the involuntary termination of the contract by acceleration. A customer might reasonably

[23]This policy is evidenced by the testimony of William Bellisario, another Portland, Oregon branch manager. It was submitted on May 24, 1977 as part of the testimony in the *Eaton* litigation.

> Whenever Ford Credit is prepaid, whether the prepayment is instigated by the customer or results from an acceleration by Ford Credit, the interest rebate is calculated and allowed in the exact same manner. (J.A. 68)

rely on this representation and enter into the contract, assuming that the credit policy was more liberal than that of a competitor which clearly disclosed an acceleration clause on the face of its contract. By making such a choice, the customer would be fulfilling the purpose of the Act. 15 U.S.C. §1601.

However, this choice might very well turn out to be meaningless. In the event of a subsequent default and acceleration, the customer would have no means by which to enforce the creditor's undisclosed policy of rebate. The only written contractual provision relating to acceleration appears on the reverse of the contract, and it does not provide for a rebate of finance charges. The undisclosed policy of the Finance Company would not prevent it from exercising the contract right to collect all unearned finance charges upon acceleration.[24]

[24]In *Hyland v. Oregon Agricultural Co.*, 225 P. 728 (Or. 1924) the Oregon Supreme Court Stated:

> 2. It is a substantive rule of law that as between the original parties to a contract and their privies, in the absence of fraud, mistake in fact or illegality in the subject matter of the contract, where the parties have entered into a contract which is complete in itself and which has been reduced to writing, it is "conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing"; and that parol evidence, that is, evidence extrinsic to the writing itself, is inadmissible for the purpose of adding to, subtracting from, altering, varying or contradicting the terms of the written contract or to control its legal operation or effect, and that all oral negotiations or stipulations between the parties preceding or accompanying the execution of the written contract are regarded as merged in it: 1 Greenl. Ev. (16 ed.), §275; *Looney v. Rankin*, 15 Or. 617 (16 Pac. 660); *Tallmadge v. Hooper*, 37 Or. 503 (61 Pac. 349, 1127); *Sutherlin v. Bloomer*, 50 Or. 398 (93 Pac. 135); *Gill v. Columbia Contract Co.*, 70 Or. 278 (141 Pac. 163); *Interior Warehouse Co. v. Dunn*, 80 Or. 528 (157 Pac. 806); *Wallace v. Oregon Engineering Co.*, 90 Or. 31 (174 Pac. 156, 175 Pac. 445). 225 P. at 729.

Moreover, should the Finance Company assign the contract to a collection agency or back to the dealer pursuant to their recourse arrangement, there is no guarantee that such an assignee would honor, or even be aware of the undisclosed rebate policy.[25]

The foregoing scenario is certainly not uncommon, and is an example of the type of fraudulent practices which motivated Congress to enact the Truth in Lending Act. As Chief Judge Pettine has explained:

[25]Such an awareness would be even more difficult to attain because of the "floating" nature of the Finance Company's undisclosed rebate policy. In 1969, prior to the effective date of the Truth in Lending Act, its contracts contained an acceleration clause virtually identical to the one in the present case, and the Finance Company argued that it was therefore entitled to retain all unearned finance charges. *Block v. Ford Motor Credit Company*, 286 A2d 228 (D.C. App. 1972).

However, in 1974 after the effective date of the Truth in Lending Act and after a Federal Reserve Board member had issued Letter No. 851, which equated acceleration with prepayment, the Finance Company developed an undisclosed rebate policy which reflected the Federal Reserve Board's position. Affidavit of L.B. Plumber. (J.A. 22). However, the written terms of the acceleration clause remained as they were in *Block*.

In 1977, after the Federal Reserve Board staff had issued Official Staff Interpretation No. FC-0054 which equated payment after acceleration with prepayment, the Finance Company's undisclosed policy had again changed to accord with the position of the Federal Reserve Board. Testimony of William Bellisario (J.A. 68). Again, however, the actual written terms of the acceleration clause did not change. To the extent the United States may suggest that there is no divergence between Finance Company's practice, as set forth in its employees' affidavits, and its contractual right to retain all unearned charges, the United States has obviously misread the record. Amicus Brief of United States, 5n2, 40n19.

> One of the purposes of the Truth in Lending Act is to inform the borrower of his or her potential liabilities in the event of default; that a creditor may have a policy of not imposing a delinquency charge does not excuse failure to disclose the ability to impose such a charge, or conversely to make an express disavowal of the right to collect it. Whatever the policy of the defendant might be, the fact remains that it is free by the terms of the loan contract to retain unearned interest after acceleration. What is important for the purposes of the Truth in Lending Act is the disclosure of charges the lender asserts a right to collect when he extends credit, not whether or not he actually asserts the right or can legally do so. *See Barnett v. Vernie Jones Ford*, 395 F. Supp. 904 (N.D. Ga. 1975), aff'd, 578 F.2d 1185 (5th Cir. 1978). *Tarplain v. Baker Ford, Inc.*, 466 F. Supp. 1340, 1346 (D. RI 1979).

The United States has adopted this reasoning in its Amicus Brief, stating:

> If the Creditor's policy is not to enforce certain of its contractual rights, that policy should likewise be subject to disclosure under the Act. Amicus Brief of United States, 30.

In accord with the provisions of the Truth in Lending Act, the pronouncements of the Federal Reserve Board, and the position of the Solicitor General, the judgment below should be affirmed.

IV.

THE PREPAYMENT REBATE DISCLOSURE ON THE FACE OF THE FINANCE COMPANY'S CONTRACT DID NOT PROVIDE THE CONSUMERS WITH MEANINGFUL INFORMATION REGARDING THE EFFECT OF ACCELERATION ON THE FINANCE CHARGE.

The United States agrees with the consumers that prepayment and acceleration each involve early termination of the contract and a subsequent, potential adjustment of the finance charge.

> Because the finance charge is included in the amount of the debt at the inception of the contract, exercise of either the creditor's right to accelerate or the debtor's right to prepay in full requires a determination of the amount owing at the time the right is exercised. Amicus Brief of United States, 10.

> While the right of acceleration need not be disclosed, the Board staff recognized that the process of acceleration may subject the borrower to additional costs that must be disclosed if the consumer is to be "given the information he needs to make the best informed decision on the use of credit." H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967). Amicus Brief of United States, 12.

If the consumer is to make a meaningful and informed choice between several alternative credit plans, there must be a disclosure which is phrased in a manner which allows the consumer to understand the rebate policies for prepayment and acceleration, regardless of whether or not these policies are identical.

The Finance Company asserts that its disclosure of the rebate upon voluntary prepayment adequately disclosed its policy of rebate upon acceleration. However, the disclosure does not state, or even imply, that it applies to the process of acceleration as well as prepayment, and therefore is not in accord with the purpose of the Act to convey meaningful information to the consumer.

A. Acceleration and Prepayment Are Separate Concepts, Both Legally and In the Mind of the Average Consumer.

The question in regard to the Finance Company's contract is whether or not the prepayment disclosure is clear enough to convey an understanding of the effect of acceleration on unearned finance charges to the average, credit-ignorant consumer whom the Act was intended to protect.[26] See *Mourning v. Family Publications*, 411 US at 363.

The applicable words in the Finance Company's disclosure are:

> Buyer may prepay his obligations under this contract prior to maturity of the final installment hereunder, . . . (J.A. 9, 65).

[26]With consumer protection legislation, it must be remembered that:

> [T]he law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions. *Spradling v. Williams*, 566 SW 2d 561, 563, (Tex. 1978). *Accord: Stork Restaurant v. Sakati*, 166 F.2d 348, 359 (9th Cir. 1948).

The first significant word which the customer reads is the term "prepay," which connotes an early payment, one made before a scheduled due date.[27] When this word is preceeded by the term "may," the combination clearly implies an optional, early payment. This is contrasted to the concept of acceleration, which is never voluntary, and which means an involuntary maturation of a due date sooner than expected.

The disclosure further indicates that the customer may prepay the contractual obligation "prior to maturity of the final installment hereunder." A consumer may assume that upon acceleration of the indebtedness the right to prepay, and consequently to receive a finance charge rebate, is forfeited since the due dates of all the installments, including the final payment, have been accelerated.

This realization has a legal basis. Acceleration by its very nature permits the creditor to mature the entire debt at once to facilitate an immediate resolution of the whole contract. This avoids the burden of either seeking remedies on each installment as they separately become due or waiting until the last scheduled installment is past due.

When the creditor accelerates the balance of the

[27]Webster's Seventh New Collegiate Dictionary defines "prepay" as: "to pay or pay the charge in advance." On the other hand, the term "accelerate: is defined as: "1: to bring about at an earlier point of time, 2: to add to the speed of, 3: to hasten the ordinary progress or development." (1972 ed.)

contract, there is no longer a future maturity date.[28] By the terms of the Finance Company's prepayment disclosure, upon acceleration the customer loses the right to prepay, and therefore the right to receive a finance charge rebate.

It is unrealistic to assume that the average consumer will be able to discern that prepayment is the equivalent of acceleration for the purposes of the finance charge rebate. The necessity for this assumption, created by the staff letters of the Federal Reserve Board, is avoided by the Ninth Circuit rule which provides the consumer with a clear disclosure of the separate rebate methods.

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[28]It is a generally accepted rule of state law that when a creditor declares the contract balance due and payable that that act accelerates the "maturity" of the obligation. Since maturity has already occurred, "prepayment" can no longer be made before "maturity."

> "Stipulations such as are contained in acceleration clauses providing that upon default of the payer the payee at his option may declare the entire amount of the note due and payable are not regarded as in the nature of a penalty or forfeiture and are therefore not viewed with disfavor by the courts. They are considered as agreements between the parties for bringing the notes to an earlier maturity than by the terms of the instrument otherwise provided." *Reid v. Wentworth and Irwin*, 63 P2d 210, 212, (Or. 1937).

See Stewart v. Casey, 595 P.2d 1176, 1179 (Mont. 1979); *Empire Trust Co. v. Equitable Office Bldg. Corp.*, 167 F.2d 346 (2nd Cir. 1948); *Walter E. Heller & Co. v. Mall, Inc.*, 267 F. Supp. 343 (E.D. La. 1967); *Genn v. CIT Corp.*, 392 A.2d 1135 (Md. Ct. Spec. App. 1978). See also Uniform Consumer Credit Code §§2.510, 2.210(8), 3.210(8); 10 C.J.S. Bills & Notes §251(a) at 748.

V.

THE DECISION AND ANALYSIS OF THE COURT BELOW IS IN ACCORD WITH THE PRINCIPLES OF THE TRUTH IN LENDING ACT.

The Court below held that the Finance Company was liable to the Consumers for failure to disclose in the face of the contract an acceleration clause and its effect on the rebate of unearned interest. This ruling was based on the court's previous holding in *St. Germaine v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), in which the Court ruled:

> When we equate acceleration with prepayment, the disclosure obligation under §226.8(b)(7) is evident: The creditor must disclose whether a rebate of unearned interest will be made upon acceleration and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated. 573 F.2d at 577.

Contrary to the assertion of the Finance Company this ruling is in accord with the basic principles enunciated by the Federal Reserve Board staff Letters. Both the Ninth Circuit and the staff letters equate acceleration with prepayment, recognize that each event causes an early termination of the contract, and provide that the resulting potential for adjustment of the finance charge is information which is important for the consumer to understand and therefore must be included in the disclosure obligation of §226.8(b)(7). The position of the Respondents is that the Act has been violated by the Finance Company and that the judgment below can be sustained under either the analysis of the Ninth Circuit as set forth in *St. Germaine*, or

under the basic premises of the Federal Reserve Board staff letters.

However, the decision of the Ninth Circuit, unlike the staff letters, provides for a disclosure rule which in all aspects of its application is always in accord with the purposes of the Truth in Lending Act. The analysis contained in the letters issued by the staff of the Federal Reserve Board breaks down in its application of general Truth in Lending principles to particular circumstances, thereby failing to provide useful and meaningful information to consumers. The lower Court avoided these inconsistencies in the staff letters by realizing that the adequacy of a disclosure can only be judged in reference to the clarity of the information which it provides to the consumer. It is the consumer who must receive a "meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and thereby avoid the uninformed use of credit." 15 USC §1601.

A. The Rule of the Ninth Circuit Guarantees that the Creditor Will Consistently Disclose Meaningful Information Regarding Finance Charge Rebates.

The Federal Reserve Board staff initially equated the concept of prepayment with that of acceleration, and by adopting this analysis for the purposes of disclosure under §226.8(b)(7), the Ninth Circuit has developed a rule which results in consistently meaningful disclosure when applied to any of the contract situations addressed by the letters of the Federal Reserve Board staff. This rule is simple and uniform; the creditor must

always disclose whether or not a finance charge rebate will be made upon acceleration in conjunction with an identification of the method of computing that rebate.

The rule encompasses all of the various creditor rebate policies, whether they are simple or intricate, in accord with state law, or identical with that for prepayment. Whatever the nature of the policy, it must be clearly disclosed in reference to acceleration.

Unlike certain portions of the Federal Reserve Board staff letters, application of this rule will never result in a situation where the consumer must predicate meaningfulness of disclosure upon reliance on the undisclosed rebate policy of the creditor, or familarity with the various and often intricate state consumer credit statutes. The consumer will always be able to rely on a clear contractural disclosure as to those circumstances which will affect the finance charge and will never have to approach a contract with a pen in one hand and a volume of state statutes in the other.

Most significant of all of the benefits of the Ninth Circuit rule is that it does not require the consumer to guess that the term "prepayment" is equated with "acceleration." The rule guarantees to the consumer enough information to clearly understand that there are two concepts involved with the rebate of finance charges, a rebate which may result from prepayment and one which may result from acceleration. By requiring the disclosure of the concept of acceleration in connection with the method for rebates, the Court is supplying the consumer with the necessary referent to insure a consistently meaningful disclosure. E.g., *Bone v. Hibernia Bank,* 493 F.2d 135, 138 (9th Cir. 1974).

The Solicitor General has criticized this approach as

necessitating redundant disclosures when the rebates are identical for prepayment and acceleration. Amicus Brief of United States, 27. Such a redundancy is not an unavoidable consequence of the Ninth Circuit's rule. If a creditor's rebate policies are identical for prepayment and acceleration, a creditor might simply disclose as follows:

> In the event of prepayment in full or acceleration of the obligation, Buyer shall receive a rebate of the unearned portion of the finance charge computed under the sum of the digits method.

Such a disclosure is not redundant, but rather is simple, clear and provides the consumer with meaningful information. If the creditor's rebate policies are different, then the creditor would have to disclose one policy for prepayment and one for acceleration. By their very natures such disclosures would not be redundant. *See* Staff Opinion Letter No. 851.

B. The Pronouncements of the Federal Reserve Board Staff Do Not Consistently Provide For A Meaningful Disclosure Regarding Finance Charge Rebates.

The Federal Reserve Board Staff has approached the acceleration disclosure problem through the context of §226.8(b)(4) of Regulation Z. This regulation provides:

> (b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> . . .

> (4) The amount, or method of computing the amount, of any default, delinquency or other charges payable in the event of late payments.

The position of the Federal Reserve Board staff is that if a creditor rebates unearned finance charges upon prepayment by one policy, but uses a different policy to rebate finance charges upon payment after acceleration, the difference is a charge to the customer which must be disclosed under §226.8(b)(4). If the rebates under the two policies are the same then there is no charge to the customer and no requirement to disclose a default charge pursuant to §226.8(b)(4) or to mention on the disclosure statement the fact of acceleration and its effect on the finance charge. *See* Staff Opinion Letters No.'s 851, 1208.

This approach, however, generates several obstacles to guaranteeing that in all circumstances the consumer will receive a meaningful disclosure. The first obstacle is that if the creditor's rebate methods for acceleration and prepayment are identical, the contract will not contain a separate disclosure as to charges resulting from acceleration. Consequently, by reading the face of the contract the consumer will be able to gather information from only one disclosure which concerns finance charge rebates. By its terms, however, this disclosure would appear to apply only to rebates upon prepayment.

The meaningfulness of this disclosure is therefore dependent upon the unrealistic assumption that the average consumer will be able to equate prepayment with the concept of acceleration for it is only by making this connection that the consumer will be able to clearly understand that upon termination of the

contract by acceleration there may be a rebate of unearned finance charges. However, the average consumer will not equate the voluntary act of prepayment with the involuntary acceleration of the maturity date of the contract. *See* Section IV, *supra.*

This approach by the staff of the Federal Reserve Board also hinders the ability of the consumer to meaningfully compare the terms of the various available credit plans. The staff letters indicate that if the creditor rebates finance charges upon acceleration by a method different from that disclosed for prepayment the resulting rebate difference is a charge which must be disclosed with the delinquency charges in the face of the contract. However, if two individual creditors each rebate finance charges upon acceleration by the same method, but differ as to the method to be used for prepayment such that the first creditor rebates on prepayment by the same method as used for acceleration, and the second creditor by a method different than used for acceleration, the consumer will be faced with conflicting disclosures.

In the first contract the consumer will find the charges relating to acceleration disclosed with the delinquency charges on the face of the contract. In the second contract, *even though the creditor uses the same rebate method for acceleration as the first creditor*, the consumer will find no disclosure of charges upon acceleration and no mention on the face of the contract of the process of acceleration.

One of the purposes of the Truth in Lending Act is to guarantee meaningful disclosure such that the consumer "will be able to compare more readily the

various credit terms available to him and avoid the uninformed use of credit." 15 USC §1601(a). In the foregoing situation the consumer would not be able to meaningfully compare the two credit plans, and this approach by the Federal Reserve Board staff is not in accord with the purpose of the Act.

A third obstacle to the meaningful application of the statements of the Federal Reserve Board staff concerns the change in approach to the circumstances creating a finance charge rebate. In Staff Opinion Letter No. 851 the staff equated prepayment with the act of acceleration. However, in the later Official Interpretation No. FC-0054 the approach was to equate prepayment with *payment* after acceleration. When the later staff of the Federal Reserve Board altered their approach they did not define what constitutes payment after acceleration, consequently leaving that definition to the descretion of the creditor and the provisions of the various state consumer credit statutes. Even more significantly, however, with the change in approach the Board's staff pinpointed the time for comparison of rebate methods for prepayment and acceleration as that time when payment after acceleration occurs.

There are several problems with this approach. First, each individual creditor may have a different policy as to when it considers payment to have occurred. Payment could occur upon the securing of a judgment against the customer, or upon execution of the judgment, or upon the decision to retain a repossessed automobile in satisfaction of the indebtedness. Consequently, there could be as many different disclosure rules as there are creditor definitions of payment. None of these various definitions would have to be disclosed

on the face of the contract.[29]

Second, there is considerable variation among the states as to when a finance charge rebate must be made upon acceleration. *See* Appendix A.[30] The approach of the Federal Reserve Board staff does not accommodate these various options, and hinders the ability to have a meaningful disclosure.

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[29]State law may well serve to intensify this confusion. ORS 83.830(1)(a) provides:

> (1) Notwithstanding any other provision of law:
>
> (a) If the buyer defaults in the performance of a retail installment contract or retail charge agreement subject to ORS 83.010 to 83.190 or 83.510 to 83.680 which is for the sale of consumer goods or motor vehicles, and if the seller repossesses or voluntarily accepts surrender of the goods or motor vehicles, and if at the time of default the unpaid time balance or time sale price is less than $1,250, the buyer shall not be personally liable to the seller for any deficiency between the amount of his unpaid obligation and the amount realized by the seller on resale or other disposition of the goods or motor vehicles. (ORS 83.830(1)(a)) (Or. L. 1973).

Even though the creditor may not have received repayment of the full price of the automobile, the customer is not liable to the creditor for any further sums. Can the customer claim that payment after acceleration has been made?

[30]ORS 82.010(1)(a) provides that after acceleration interest may continue to accrue on the unpaid balance.

> (1) The legal rate of interest is nine percent per annum and is payable in:
>
> (a) All moneys after the become due; (ORS 82.010(1)(a) (Or. L. 1979).

Depending upon when payment after acceleration occurs, this accruing interest would continue to increase the amount of the unpaid balance.

C. The Analysis of the Ninth Circuit Promotes the Truth in Lending Act Goals of Clarity of Disclosure and Uniformity of Application.

The significant differences between the rule of the Ninth Circuit and the statements of the Federal Reserve Board staff are basically ones of clarity, notice and uniformity of application. The staff letters require separate disclosure of rebate methods only if the rebate method upon payment after acceleration is different from that disclosed for prepayment. In all other cases, the face of the contract or a disclosure statement will not contain any reference to acceleration or the effect of acceleration on the finance charge.

Where the consumer finds a contract silent in its face as to acceleration, there are several options available to determine whether there will be a rebate of finance charges upon acceleration. The nature of these options illustrate the significant differences between the approach of the Federal Reserve Board staff and the rule of the Ninth Circuit.

A consumer who looks to the underlying contract may find one of a number of types of acceleration clauses. In the instant case, the Respondents would have found a clause which clearly and unambiguously granted the Finance Company the right to retain all unearned finance charges upon acceleration. However, this clause is directly contrary to any rebate method disclosed on the front of the contract. This contradiction violates §226.6(c) of Regulation Z, which prohibits the inclusion in a contract of additional contradictory information.

A consumer who reads the underlying contract may also find a clause which grants the creditor the right to accelerate the balance of the contract and implies that there will be no rebate of unearned finance charges upon acceleration. This clause would mislead and confuse the consumer in violation of §226.6(c) of Regulation Z when read in conjunction with the disclosures on the front of the contract. *See* Staff Opinion Letter No. 1324.

Finally, a customer might find a clause which allows the creditor to accelerate the balance of the contract and which also provides for a rebate of unearned interest, but which is silent as to the method of computing the unearned interest. A typical example of this clause is "seller shall have the right to declare all amounts due hereunder to be payable and in this event Buyer shall receive a rebate of unearned finance charges."

In this situation the staff of the Federal Reserve Board suggests that the customer has two available options to determine how to ascertain the rebate. First, the staff suggested that undisclosed creditor rebate policy might explain the disclosure. *See* Staff Opinion Letter No. 1208. However, not only is it unrealistic to assume that the customer will have access to this undisclosed policy, but this approach also forces the consumer to rely upon the good faith of the creditor in actually exercising the undisclosed policy. *See* section III of this brief. The consumer needs to know what rebate method the creditor actually has under the contract, not what rebate policy the creditor may or may not exercise. See *McDaniel v. Fulton National*

Bank, 576 F.2d 1156 (5th Cir. 1978).[31]

Finally, another staff letter suggests that state law will tell the consumer what rebate method the creditor must use. *See* Staff Opinion Letter No. 1324. However, forcing the consumer to interpret the contract through a familarity with state law frustrates the purpose of the Act to provide meaningful disclosures. 15 USC §1601. Also, there are numerous variations among the states in regard to rebates upon acceleration, and in some states the issue of the right to a finance charge rebate upon acceleration has been resolved. See Appendix A.

The rule of the Ninth Circuit is clear; it requires the creditor to disclose on the front of the contract whether a rebate of unearned finance charges will be made upon acceleration and the method by which the rebate will be made. This disclosure provides the consumer with all of the necessary information, and does not force the consumer to look elsewhere to find the information necessary to understand the effect of acceleration upon the finance charge.

VI.

THE APPROACH OF THE STAFF OF THE FEDERAL RESERVE BOARD FRUSTRATES AN IMPORTANT ENFORCEMENT MECHANISM OF THE TRUTH IN LENDING ACT.

[31]The Fifth Circuit clearly held that the creditor must disclose the contractual right to retain unearned interest upon acceleration. The Solicitor General has criticized this opinion for stating th[illegible] the disclosure is required without a further disclosure of creditor policy. Amicus Brief of United States, 29.

The approach in the Federal Reserve Board staff letters suggests that the rebate method for acceleration may be hidden within the disclosure concerning prepayment, and thereby frustrates the private enforcement of the Act. When Congress enacted the Truth in Lending Act it was with the intent of assuring enforcement by creating private attorneys general out of consumers.

The Act encourages consumers to enforce its provisions by providing minimum damages to the successful litigant, as long as the consumer institutes an action within one year of the date the transaction is consummated.[32] *See Ratner v. Chemical Bank New York Trust Company*, 329 F. Supp. 270, 280-281 (S.D.N.Y. 1971); *Ives v. W. T. Grant Company*, 522 F.2d 749, 756 (2nd Cir. 1975); *White v. Arlen Realty and Development Corp.*, 540 F.2d 645, 649 (4th Cir. 1975); *Hannon v. Security National Bank*, 537 F.2d 327, 328 (9th Cir. 1976).

[32] § 130(a) of the Act, 15 USC § 1640(a) provides:

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of–

(1) any actual damage sustained by such person as a result of the failure;

(2) (A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

The policy of the Federal Reserve Board's staff potentially frustrates this enforcement mechanism. Under the provisions of Staff Opinion Letter No. 1208, the existence of a disclosure violation is contingent upon whether in fact the creditor rebates upon payment after acceleration in accord with the method disclosed for voluntary prepayment. In most situations, this "fact" of method of rebate will not be determined until there is a default under the contract by the customer and a subsequent acceleration by the creditor.

If this default occurs later than one year from the date the contract was executed, the consumer is no longer protected by the Act. Because the disclosure may contain no explicit statement regarding the consumers right to a rebate upon acceleration, even where the contract contains an acceleration clause, the creditor may decide not to rebate any finance charges to the customer. Regardless of what the consumer may have been led to believe concerning rebate, if there is an acceleration, the consumer has no remedy under the Truth in Lending Act since the one year statute of limitations has expired.

The Federal Reserve Board's staff letters appear to assume that until the creditor's actions indicate otherwise, the prepayment disclosure also reflects the creditor's method for rebates upon acceleration. When this assumption is analyzed in connection with the one year statute of limitations, it is clear that a change in the

creditor's non-binding rebate methods can frustrate an important enforcement mechanism established by Congress.

The Ninth Circuit's rule of disclosure avoids these problems of hidden and changing credit terms by simply requiring prior disclosure of whether and how the creditor will rebate unearned finance charges if there is an acceleration.

VII.

THESE PORTIONS OF THE PRONOUNCEMENTS BY THE FEDERAL RESERVE BOARD STAFF WHICH ARE NOT IN ACCORD WITH THE PRINCIPLES OF THE TRUTH IN LENDING ACT SHOULD NOT BE ACCORDED DEFERENCE BY THE COURT.

The Respondents recognize that when the construction of an administrative regulation is in issue, great deference is due to the promulgating agency's own construction. *Udall v. Tallman*, 380 US 1, 16 (1965). However, in the case before this Court all of the pronouncements regarding acceleration have come from the staff of the Federal Reserve Board, rather than the Board itself. Respondents also note that the degree of deference "in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if not control". *Skidmore v. Swift & Co.*, 323 US 134, 140 (1944); *see also Bone v. Hibernia Bank*, 493 F.2d 135 (9th Cir. 1974).

The Federal Reserve Board Staff has adopted an approach to the question of disclosure of finance charge rebates which is in accord with the principles of Truth in Lending. The Board's staff agrees that the effect of acceleration on the finance charge is important information to be disclosed to the consumer. Such a position is in accord with the purpose of the Act that the "informed use of credit results from an awareness of the cost thereof by consumers," and this position should be adopted. 15 USC §1601(a).

However, certain of the Board's statements concerning the circumstances under which a specific disclosure must be made of the effect of acceleration on the finance charge do not fulfill the purpose of the Act of "assur(ing) a meaningful disclosure of credit terms." 15 USC §1601(a).

These statements, particularly those the application of which would require the consumer to equate prepayment with acceleration in order to obtain meaningful information from the contract, do not evidence the requisite thoroughness of consideration to be accorded deference by the Court.

CONCLUSION

It is clear that under the principles of the Truth in Lending Act and the specific disclosure requirements of Regulation Z that the effect on the finance charge as a result of the process of acceleration should be disclosed to the consumer. It is also clear that under either certain of the pronouncements of the Federal Reserve Board staff or the opinion below, the Finance Company

has violated the provisions of Regulation Z in regard to the Respondents, and therefore the judgment below should be affirmed.

However, while the basic approach of the Federal Reserve Board Staff is in accord with the principle that the effect on the finance charge of acceleration is important information to be disclosed to the consumer, in certain significant respects the Board's position fails to guarantee consistently meaningful disclosures of this information to the consumer. The approach by the Ninth Circuit avoids this problem, and the judgment below should be affirmed based on the analysis of the Court below and *St. Germaine v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977).

Respectfully submitted

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APPENDIX A

STATE STATUTORY AND CASE LAW CONCERNING REBATE OF UNEARNED FINANCE CHARGES FOLLOWING DEFAULT*

The following statutes and cases require that a rebate of unearned finance charges be made as of the date of acceleration:

Iowa	Consumer Credit Code §2.510(6)
Pennsylvania	69 P.S. §622(b) (date of "liquidation")**
Wisconsin	Banking §76.01(2) (date of "liquidation")**

Walter E. Heller & Co. v. Mall, Inc., 267 F. Supp. 343 (E.D. La. 1967)

Credit Alliance Corp. v. Adams Construction Corp., 570 S.W.2d 283 (Ky. 1978)**

*A few states—for example, California, Louisiana, New York, Wisconsin—have passed more than one statute on the question of rebating unearned finance charges following default, each dealing with particular types of transactions (e.g., motor vehicle installment sales, all other retail installment sales). When such statutes utilize different dates for determining the rebate, they are listed separately, under their appropriate paragraph heading.

Discrepancies between a state's statute(s) and its case law are usually due to the fact that the case predates the statute, and occasionally the result of the court's misreading of the statute.

Individual variations from a paragraph heading are noted in parentheses following the citation.

**The correct interpretation of these statutes/cases is open to question.

Associates Discount Corp. v. Solar, 209 S.2d 127 (La. App. 1968)

Berger v. DeSalvo, 156 So.2d 323 (La. App. 1963), *cert. denied*, 157 S.2d 231 (La. 1963)

Genn v. CIT Corp., 392 A.2d 1135 (Md. Ct. Spec. App. 1978)

Spiotta v. William H. Wilson, Inc., 179 A.2d 49 (N.J. 1962) (date of "default")

Grissom v. Dye, 269 P.2d 367 (Okla. 1953)

Garland v. Union Trust Co., 165 P. 197 (Okla. 1917)**

Moore v. Sabine National Bank of Port Arthur, 527 S.W.2d 209 (Tex. Civ. App. 1975) (date of accelerated "maturity")

The following statutes require that a rebate of unearned finance charges be made as of the date of acceleration *or* repayment:

New York	Personal Property Law Art. 9 §305(3); Art. 10 §408(6)

The following cases require that a rebate of unearned finance charges be made as of the date of acceleration *and* payment:

Dartmouth Plan, Inc. v. Landkammer, 82 Misc.2d 71 (N.Y. 1975)

Berman v. Schwartz, 59 Misc.2d 184 (N.Y. 1968)

Tobin v. Holmboe, 45 P.2d 716 (Okla. 1935)**

The following statutes and cases require that a rebate of unearned finance charges be made as of the date the creditor files suit:

Louisiana	Consumer Credit Law §6:958C; §9:3529
South Dakota	S.D. C.L. §54-3A-10

Chapman v. Capri Construction Co., 248 So.2d 101 (La. App. 1971)

New Jersey Mortgage and Investment Corp. v. Young, 341 A.2d 360 (N.J. 1975)

Chavez v. Aetna Finance Co., 553 S.W.2d 174 (Tex. Civ. App. 1977), *aff'd*, 561 S.W.2d 799 (Tex. 1978)

The following statutes require that a rebate of unearned finance charges be made as of a date dependent on whether the creditor repossessed or resold the collateral, or the date of judgment:

California	Civil Code §1806.3(b) (the date the creditor takes possession of the collateral or the date of judgment); §2982(d) (15 days after the surrender or repossession and disposition of the motor vehicle)
North Carolina	G.S. N.C. §25A-32 (date of judgment or 15 days after repossession)

The following statutes and cases require that a rebate of unearned finance charges be made as of the date of judgment:

Colorado	UCCC §2.210(8); §3.210(8)
Hawaii	§408-15(f) H.R.S. (date of payment judgment)
Idaho	UCCC §2.210(8); §3.210(8)